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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

RONALD A. GILLESPIE,

Petitioner,

vs.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN and THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

What must a plaintiff prove in order to establish that a reasonable alternative selection device exists to an employment test that was specifically created for a single job recruitment and has substantial disparate impact?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner, and the appellant below, is Ronald A. Gillespie.

The respondents, and respondents below, are the State of Wisconsin, and two of its agencies, the Department of Health and Social Services and the Department of Employment Relations.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Petitioner, Ronald A. Gillespie, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on August 26, 1985.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is contained in the petitioner's appendix at pp. 1A-2A. The judgment and memorandum and order of the district court are not published and are contained in the petitioner's appendix at pp. 24A-35A.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was originally entered on August 26, 1985. This petition for certiorari is being filed within 90 days of the entry of the order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 2000e-2 provides, in relevant part, as follows:

§ 2000e-2. DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Plaintiff Ronald A. Gillespie brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, seeking declaratory and injunctive relief, back pay, and other make whole relief on behalf of the plaintiff and the class of minorities whom he represents. (R. 2, Complaint) The named plaintiff is an adult black male who was formerly employed by the State of Wisconsin in its Department of Health and Social Services. The class of plaintiffs consists of approximately forty minorities who applied for jobs as a Personnel Specialist I or Personnel Manager I with the State of Wisconsin during the relevant time period. (R. 11, Motion and Order for Class Certification)

The defendants are the State of Wisconsin and two of its agencies. The Department of Employment Relations is the state agency responsible for developing employment tests and hiring criteria. That agency developed the tests at issue in this case. (R. 82, Tr. Vol. I, pp. 11-14) The Department of Health and Social Services was Mr. Gillespie's employer while he worked for the State of Wisconsin and it hired Personnel Specialists from the certification lists to fill open positions for which Mr. Gillespie and the other class members had applied. (R. 82, Tr. Vol. I, pp. 9 & 15-16)

Gillespie had served for more than a year as a Personnel Specialist I for the Department of Health and Social Services, in a limited term employment capacity, at the time of the examination in question. (R. 82, Tr. Vol. I, p. 10) According to the testimony of his supervisor, Mr. Gillespie had performed in that position in a satisfactory manner. (R. 82, Tr. Vol. I, p. 51)

The State of Wisconsin fills certain of its government jobs through a competitive civil service system. In 1980, applications were accepted for vacancies which then existed for entry level Personnel Specialists and Personnel Managers in state service.

On February 8, 1980, Gillespie was one of 451 applicants who took a written examination for permanent appointment to one of the Personnel Specialist/Manager positions. (R. 82, Tr. Vol. I, p. 13) Mr. Gillespie, however, did not make the initial cut-off on the written examination and was removed from further consideration in the hiring process. (R. 82, Tr. Vol. I, p. 13)

Mr. Gillespie subsequently filed a timely charge of employment discrimination, probable cause was found, and a timely action was commenced. (Exs. 7, 8 and 9) The complaint alleged that the defendants utilized a written test which had a substantial disparate impact on minority job applicants and that the test was discriminatory. (R. 2, Complaint)

The employment test was an essay examination which consisted of three separate questions and an overall writing skills analysis. (App. 36A-43A) Equal portions of the overall score were allocated for each of the three questions, and an identical and equal portion of the score was assigned to the overall writing skills analysis. (Ex. 106) Both the use of an essay examination and the use of the particular type of essay examination employed in this case were contrary to the defendants' own guidelines for the use of essay examinations. (App. 44A-45A)

In the previous recruitment for entry level personnel positions, Wisconsin had utilized a multiple choice exam-

ination. (App. 25A) The examination at issue in this case will also not be reused by the state for security reasons. (App. 30A)

The examination was developed by internal staff of the Department of Employment Relations. (R. 82, Tr. Vol. I, p. 62) It was prepared in conjunction with an examination committee, which also consisted exclusively of state employees. (R. 82, Tr. Vol. I, pp. 63-64) None of these committee members was an expert on examination construction or validation. (R. 82, Tr. Vol. I, p. 64)

The examination was one of three separate steps in the hiring process. (R. 84, Tr. Vol. II, p. 33 & Ex. 19) The written test served as a screening device to eliminate from consideration all of those applicants who received a composite score below a numerical fifty on the examination. (R. 82, Tr. Vol. I, p. 134)[1] That cutoff score was established after the examination was given, and it was utilized primarily to reduce the number of candidates who would proceed to the next step, the oral board. (R. 84, Tr. Vol. II, p. 16)

After the oral board, the written test scores of the remaining applicants were combined with their oral board scores to come up with an overall score. (Ex. 133) That overall score determined the applicant's ranking on the list of eligible candidates. The written examination scores, therefore, served both as a screening and as a ranking device.

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[1] The use of the term "screening device" is not meant to connote that applicants who failed to meet the cutoff lacked the basic skills necessary to perform the jobs. The test was used to reduce the number of applicants, not to assure minimal levels of competency.

The applicants having the highest overall scores were then certified to be interviewed for appointment to vacant state positons. (Ex. 19) Those applicants receiving the highest composite scores, who were not immediately hired, were retained on a list of eligibles for future appointments. In all, nine or ten personnel positions were filled from the pool of applicants. (R. 82, Tr. Vol. I, pp. 98-99)

The fact that the examination eliminated minorities from further consideration at a statistically significant higher rate was not seriously disputed and was admitted in some of the defendants' own internal correspondence. (Ex. 14) The minority pass rate was only 23%, while the white pass rate was 43%. The minority pass rate was therefore only 55% of the white pass rate. The probability that minorities would be eliminated from further consideration at such a higher rate being due to chance was about one in one hundred. (R. 82, Tr. Vol. I, pp. 132-133)

The average minority score was also significantly different than the average white score. The probability of the difference in average scores between white and minority applicants that occurred being due to chance was between one in one thousand and one in ten thousand. (R. 82, Tr. Vol. I, p. 136)

This substantial disparate impact was primarily the result of one question, part of a second question, and the overall writing analysis. (R. 82, Tr. Vol. I, pp. 139-142) Plaintiff's evidence focused on two specific factors; the nature of the first essay question and the defendants' use of an essay examination which included a written skills analysis and consisted of very few questions.

The evidence showed that the greatest disparate impact on the examination came on question one. That question, in essence, requested the applicant to write a job description for a groundskeeper or gardener. For this question, the average minority score was 6.6, while the average white score was 9.7. A difference this large on that question could only have occurred by chance in one out of every 25,000 attempts (R. 82, Tr. Vol. I, pp. 138-140) The confidence level of disparate impact on this question was therefore very high indeed.

The plaintiff introduced evidence to show that minorities, because they essentially live in urban central city environments, and usually in rental units rather than individual single family dwellings, are less familiar with both the concept and the terminology of gardening. (R. 82, Tr. Vol. I, pp. 150-151, 180-181) Thus, since the writing of a job description consisted of listing and analyzing, in a meaningful fashion, the functions of gardening, minorities were placed at a disadvantage which bore no relationship to the ability actually sought to be tested.

The plaintiff introduced evidence to show that the use of so few questions magnified the impact of any cultural biases contained within the problem questions. The plaintiff also introduced testimony indicating that frequently, because of the difference in minority and white writing patterns, the use of an essay type exam, especially one which utilized an overall writing skills analysis, had a disparate impact on minorities. (R. 82, Tr. Vol. I, pp. 153-156) *See also* App. 45A.

The defendant Department of Employment Relations was aware, prior to the establishment of the cutoff score, and prior to certifying the applicants to the next step in

the hiring procees, that the examination had had a very significant disparate impact on minority applicants. (R. 82, Tr. Vol. I, p. 119) Nevertheless, the selection procedure was thereafter continued with a reduced number of minority candidates.

The trial court conducted a bifurcated trial on the merits. Following the trial, the court concluded that the written examination had a significant disparate impact on minority applicants.[2] (App. 28A) The court also concluded that the test did not meet the highest standard expected by experts. (App. 31A) However, the trial court concluded that the defendants had established that the test was job-related and that the plaintiffs had failed to show that other tests, without a similarly undesirable disparate impact, would also serve the defendants' legitimate interests in obtaining qualified applicants and dismissed the complaint. (App. 30A-31A) The Court of Appeals for the Seventh Circuit affirmed. (App. 22A)

REASONS FOR GRANTING THE PETITION

The factors which this Court will consider in determining whether to grant a petition for certiorari are contained in Supreme Court Rule 17. That rule provides that a writ of certiorari may be appropriate where the petition seeks to review a decision of a federal court of appeals which is in conflict with the decision of other courts of appeals on the same question or where a court of

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[2] The trial court, however, also found that the challenged questions were not culturally biased. (App. 29A) This finding is based upon evidence not in the record, as the language of the entire finding indicates.

appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In addition, a writ of certiorari would also be appropriate where a federal court of appeals has decided an important question of federal law which has not previously been, but should be, finally settled by this Court, or has decided a federal question in a way which is in conflict with the applicable decisions of this Court.

We believe that this petition for certiorari should be granted, under those standards, for two reasons. First of all, the decision of the circuit court was in conflict with the decisions of other circuit courts on the same issue. Secondly, we believe that this petition presents an important issue of federal law which requires clarification and has never before been directly decided by this Court.

That question focuses on the nature of a plaintiff's burden of proof on the third part of the disparate impact analysis when the employer uses an employment test only once, and the test used had a substantial disparate impact on minorities. We contend that the standard applied by the court below would, in such situations, effectively eliminate the third prong of the disparate impact test.

I. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

This Court has previously set out two different tests to apply in Title VII cases, the disparate treatment test and the disparate impact test. However, regardless of the theory employed, the overriding concern of Title VII remains the same.

> "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

This is an employment test case and thus proceeded to trial on a disparate impact theory. That theory was originally approved by this Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). It has been subsequently clarified in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

Griggs, *Albemarle*, and *Teal*, *supra*, all involved the use, in whole or in part, of written examinations to either screen or rank job applicants, or applicants for promotion. In all of these cases, the Supreme Court has held that the use of such examinations is to be subject to close scrutiny because of the tendency of such tests to favor certain groups.

> "The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 CFR § 1607.4 (c)." *Albemarle*, 422 U.S. at 431.

The standards applicable to public employers are the same as those employed when evaluating employment practices of private employers, *Dothard v. Rawlinson*, *supra*. The essence of the disparate impact analysis is that "good intent or absence of discriminatory intent does

not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432.

Griggs held that employment tests, that are discriminatory in effect, are prohibited by Title VII unless the employer meets the burden of showing that any given employment requirement has a "manifest relationship" to the employment in question. *Griggs*, 401 U.S. at 432. Moreover, if the plaintiff establishes that a specific hiring procedure had a disparate impact on minorities, it is not a valid defense for an employer to seek to establish that the "bottom line" hiring percentages were not disparate in effect. See *Connecticut v. Teal, supra*. As the court indicated in *Teal:*

> "A non-job-related test that has a disparate racial impact, and is used to 'limit' or 'classify' employees, is 'used to discriminate' within the meaning of Title VII, whether or not it was 'designed or intended' to have this effect and despite an employer's efforts to compensate for its discriminatory effect." 457 U.S. at 452.

The *Griggs'* decision, as well as its progeny, have delineated a specific order of proof, and specific burdens of proof, which must be followed in order for the court to make the necessary factual determinations on the discrimination question. The plaintiff must first establish that the tests in question select applicants for hire in a racial pattern significantly different than that of the pool of applicants. If the plaintiff meets that burden, the burden then shifts to the employer to prove that the test it administered was job related. If the employer meets its burden on job relatedness, then the plaintiff would be giv-

en an opportunity to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interests. See *Albemarle Paper Company*, 422 U.S. at 425.

It is clear that a plaintiff will meet his burden of proof under the first prong of the test by introducing expert testimony or other competent evidence that the hiring mechanism had a statistically significant adverse impact on a protected group of applicants, *Casteneda v. Partida*, 430 U.S. 482 (1977). It is also clear that the defendant meets its burden under the second prong of the disparate impact analysis, in an employment test case, by "validating" the examination used, 29 C.F.R. § 1607.14, *et seq.* and *Albemarle*, 422 U.S. at 425.

What is required to be proven in order to meet the third prong of the test, however, is significantly less clear. That question has never been decided by this Court, except perhaps in passing. *See Dothard*, 433 U.S. at 332. In *Dothard*, the employer sought to justify minimum height and weight restrictions for prison guards on the need for physical strength to do the job. This Court merely noted that if strength were important, the employer could use the alternative selection device of testing for strength directly.

Those circuit courts which have addressed the alternative selection mechanism issue have often applied inconsistent standards. See, for example, Judge Tang's separate opinion in *Contreras v. City of Los Angeles*, 656 F.2d 1657 (9th Cir. 1981).

Since employment tests are a common mechanism for hiring or promoting employees, especially in public civil

service positions, and such tests, as in this case are routinely subjected to validation studies,[3] future litigation will increasingly focus on the existence of a reasonable alternative selection device. It is for this reason that the question, which the petitioner seeks to present to the Court for resolution, is both timely and significant.

II. THERE IS A CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTION OF THE AMOUNT OF EVIDENCE NECESSARY TO ESTABLISH A REASONABLY AVAILABLE ALTERNATIVE SELECTION MECHANISM.

There is a virtual dearth of authority on the question of what constitutes a sufficient showing of other available alternatives to satisfy the third prong of the *Albemarle* test. The authority which does exist is both conflicting and imprecise.

In a recent decision, the Court of Appeals for the Eighth Circuit refined the burden of proof set forth in *Albemarle Paper Company v. Moody, supra,* as it relates to the third prong of the disparate impact test. *Easley v. Anheuser-Busch, Inc.,* 758 F.2d 251 (8th Cir. 1985). In *Easley,* the plaintiff challenged a written pre-employment examination that had screened a disproprotionate number of minorities from further participation in the hiring procedures. After concluding that the plaintiff had established the existence of a disparate impact, the Court of

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[3] Under the relaxed standards for validation approved by both the court below and Second Circuit Court of Appeals in *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission,* 630 F.2d 79, 90-91 (2nd Cir. 1980), employers will more frequently meet this burden.

Appeals set forth the criteria for evaluating the third prong of the test as follows:

> "Additionally, an alternative selection procedure (the informal pretest hiring procedure), which did not have the same adverse impact on black applicants, was available to the company and, despite Anheuser-Busch's allegations, *had not been shown to be unsatisfactory.* 758 F.2d at 256. (Emphasis added)

The *Easley* court thus effectuated a subtle, but we believe necessary, shift in the burden of proof under the third prong of the test. It, in fact, implied that there were two separate burdens encompassed within the reasonable alternative test.

Under the language of *Easley,* the plaintiff is required to come forth and demonstrate that other reasonable alternative selection procedures were available. It then became incumbent upon the defendant to show that the alternatives identified by the plaintiff were unsuitable. *Easley* is contrary to the circuit court's decision below and also at odds with *Contreras v. City of Los Angeles, supra.*

In *Contreras,* the question was whether or not the plaintiff had established the existence of a reasonable alternative to a civil service examination for the selection of applicants for the position of auditor. The circuit court concluded that the plaintiff had failed to carry his burden of showing a reasonable alternative mechanism, even though an oral interview process had previously been used to select candidates for the position and was used by other departments in the selection of their personnel. The *Contreras* decision, and decision below, is also inconsistent with holdings in other circuits. *See E.E.O.C. v. St. Louis-San Francisco Railway Company,*

743 F.2d 739, 742 (10th Cir. 1984); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981); and *Horace v. City of Pontiac*, 624 F.2d 765, 769 (6th Cir. 1980). In none of these cases did the court imply that a plaintiff would be required to independently validate its proffered alternative.

In *Chrisner*, the Court of Appeals for the Sixth Circuit, in remanding to the district court for further evaluation of the reasonable alternative question, implied that the burden of proof was not a substantial one. That court concluded that the plaintiff could meet its burden by introducing evidence of the prior or subsequent selection practices of the employer or by introducing evidence of the selection practices of other similar employers.

In *St. Louis-San Francisco Railway*, the court was faced wth an employee's minimum height requirement which had a disparate impact. The court concluded that the employer had established that the height requirement was job related, but nevertheless reversed the trial court's decision dismissing the complaint and remanded the case for further consideration of the third prong of the *Albermarle* test. In reaching its conclusion, that court also inferred that the plaintiff's burden under the reasonable alternative test was not a substantial one. That court also focused on whether the employer had utilized other selection devices at other points in time.

> "Further, the court apparently failed to consider whether the EEOC had shown that alternative selection devices would had effectively served the company's legitimate interests. *This is a particularly relevant consideration in light of evidence in the record that the company dropped its height requirement and substituted a field test.*" 743 F.2d at 742. (Emphasis added)

In *Horace*, the 6th Circuit also concluded that the simple fact that an employer had subsequently abandoned a previously challenged selection criteria was strong evidence that the employer did have other reasonable selection mechanisms. 624 F.2d at 768-69.

The plaintiff in this case also met the *Chrisner*, *St. Louis-San Francisco Railway*, and *Horace* tests. He demonstrated both that the defendant had used other forms of selection in the past, and that the employer would use a different selection mechanism in the future. Thus, under the standards developed in these other circuits, plaintiff would have succeeded in showing the existence of other reasonable alternatives.

In *Dothard v. Rawlinson*, *supra*, this Court also treated the reasonable alternative question as flowing almost *a fortiori* from a finding that a selection mechanism had a substantial disparate impact. For, in setting aside minimum statutory height and weight requirements, where the defendant justified those standards on the basis that height and weight was reflective of strength, the court merely noted that, if strength was indeed relevant, the defendant could have tested for those qualities directly. 433 U.S. at 332. No evidence concerning whether a strength requirement would be more or less disparate in its impact on women was discussed, and no such finding was made. *Id.* at 331-32. Thus, the court supplied by common sense that which it would have been virtually impossible, in the factual context of *Dothard*, to prove, i.e., where the selection criteria creating the substantial disparate impact is created by the employer, the employer always has the reasonably available alternative of eliminating or modifying that selection criteria.

In the instant case, the plaintiff not only established that the selection device was not the employer's only method of selecting employees for the job, it also pointed to the existence of a number of reasonable alternative mechanisms which the defendant could have used in lieu of the one selected. At least two of these mechanisms were favored by the State of Wisconsin's own published policies on selection procedures.

The first such alternative was the use of a multiple choice examination instead of the essay examination which was used. The evidence established that multiple choice examinations, properly constructed, are capable of testing those qualities necessary for the job and that such examinations have less disparate impact on minorities than do essay examinations. The plaintiff's expert on testing procedures, also testified that multiple choice examinations in general tend to have less disparate impact on minorities. (R. 82, Tr. Vol. I, pp. 177-178) Moreover, the employer had previously utilized a multiple choice examination[4] and there was no indication that it had not obtained qualified employees.

Indeed, the state's own guidelines recommend the use of a multiple choice examination in those situations where there are 50 or more applicants. (App. 44A-45A) The test in question was administered to a group which was almost

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[4] The employer introduced evidence that the specific multiple-choice test previously used "may have" had a disparate impact. This evidence neither supports a finding that this type of examination, in general, has greater disparate impact than essay examinations, as stated in the circuit court opinion, nor that the examination had a disparate impact of the degree which occurred here.

nine times that large. Thus, the evidence establishes that the use of a multiple choice exam was not only reasonably available, it was administratively preferred.

> "With large numbers of applicants (50 or more), time needed for careful grading of essay exams becomes prohibitive; the multiple choice having a clear advantage under such circumstances."

The second alternative identified by the plaintiffs was the use of an essay exam, but with more questions requiring shorter answers rather than the format which was used, an examination utilizing only three questions. The defendant's own test construction guidelines also favored the use of such examinations as being more accurate and reliable than the type of test used. (App. 44A) The state's own guidelines state that:

> "An essay test including a large number of questions, say 10 to 15, in contrast to a test of 1 to 4 questions,[5] has the advantage of more adequate sampling of the job content . . . . Not only do applicants get lost while responding to long-answer questions, but raters get lost in trying to evaluate them. With short-answer questions, it is much easier to formulate a concrete basis for grading and to keep the standards in mind while looking at responses." (Ex. 11 at pp. 5-6)

In short, the defendants' own policies constitute admissions that the use of more questions, requiring shorter answers, is a reasonably available alternative to the test utilized here. Moreover it cannot be disputed that, had a larger number of questions been asked, each answer would then have represented a smaller proportion of the result.

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[5] The examination in question here had a total of four questions.

Thus, the accidental inclusion of one or two culturally biased questions would not have had the degree of adverse impact represented by this examination.

The third alternative proposed by the plaintiffs was the use of an examination of the same general nature as that used, but with the replacement of the questions having the most clearly identified disparate impact. The defendants clearly had the capability of preparing a question which would have had the applicants draft personnel work product other than a job description or even a job description for someone other than a gardener. Given the degree of disparate impact caused by that question alone, a minor revision of the test would have had a significant effect on its impact on minorities.

As a fourth alternative, the plaintiffs also established the existence of commercially available, and validated, examinations which were specifically designed to seek out those abilities which had been identified as important job skills by the job experts. (R. 82, Tr. Vol. I, pp. 177-178) The only evidence contraindicative of the use of such tests was the testimony by the defendants' witnesses that such tests were expensive.

The circuit court, in holding that the plaintiffs had failed to meet their burden under the reasonable alternative test, effectively held that the plaintiff must develop an alternative test, validate it, and prove that it would not have had a significant disparate impact on minorities. (App. at pp. 20A-21A) This burden clearly goes beyond what other circuits have required, and what this Court by implication in *Dothard* requires. Indeed, we believe these requirements also go far beyond even the requirements set forth in *Contreras*.

Because the decision below departs from these previously established standards, we believe that the Court should grant the petition in order to clarify this important area of federal law.

III. THE STANDARDS APPLIED BELOW DO NOT FURTHER THE OBJECTIVES OF TITLE VII.

We believe that this Court should review the decision below not only because of the apparent conflict among the circuit courts, but also because the court below has adopted a burden of proof which is impossible to meet. We believe that if the decision below were to be adopted as a general standard, the third prong of the disparate impact test would be effectively eliminated.

The *Easley* decision, we believe, best represents a reasonable allocation of the burdens of proof applicable to the reasonable alternative test. In fact, such an analysis is essential to the continued vitality of the reasonable alternative standard itself. See Larson, *Employment Discrimination,* Vol. 3, § 79.00 (1984). While we certainly do not agree with all points made in the Larson analysis, he does identify substantial burden of proof problems inherent in the type of reasonable alternative analysis utilized by the court below. *See also Crockett v. Green,* 388 F.Supp. 912 (E.D. Wis. 1975), affirmed *Crockett v. Green,* 534 F.2d 715 (7th Cir. 1976).

According to Larson, the placing of the burden of proof on the reasonably available alternative issue solely on the plaintiff makes little or no more sense than placing it solely on the defendant. Larson, § 79.20. Placing the burden solely on the defendant would be unfair because

it would require the defendant to prove an absolute negative, i.e., that there are *no* reasonably available nondiscriminatory alternative procedures.

Larson also aptly describes the dilemma facing a plaintiff who must alone shoulder this burden of proof as follows:

> "What gives this entire 'nondiscriminatory alternative' doctrine an air of unreality is the further fact that, when the burden of proof is placed on the plaintiff, as the Supreme Court prescribes, the possibility of any actual practical consequences is just about as remote as when the burden is placed on the employer. As a matter of logic, it of course makes much more sense to require the proving of a positive than of a negative. But as a matter of realistic feasibility, the plaintiff will seldom have access to the information necessary to meet this burden of proof." Larson, § 79.20.

In a case, such as this one, that observation has particular poignancy. This is not a case where the employer has used a standardized test and the plaintiff need only show the existence of another standardized test for the same qualities that has been shown to have less disparate impact. Here, the employer creates a custom examination every time it recruits applicants for the classification in question. Thus, the range of available alternatives to the test given is virtually unlimited.

The court below concluded that to establish a reasonable alternative, it would be necessary to create a specific examination, and then validate it and determine that it does not have a disparate impact on minority applicants. Since the test construction and validation would require the cooperation of the defendant, who has the most intimate

knowledge of the job, and a determination of potential disparate impact would require a pool of disinterested applicants, the plaintiff would not have "access to information necessary" to do what the Court of Appeals would require. Larson, *supra*.

We believe that the correct method of proceeding on the reasonable alternative issue is the one described in *Easley*, and in more detail, in *Crockett*. Judge Reynolds, in evaluating the respective proof problems of both the plaintiff and the defendant on the alternative selection mechanism question, devised a means of analysis by which neither would be faced with the burden of proving the impossible.

> "Literally applied, the 'no-alternative' approach to 'business necessity' in the case law and the E.E.O.C. Guidelines, 29 C.F.R. § 1607.3, places upon an employer the practically impossible burden of proving an absolute negative, i.e., the nonexistence of any alternative procedures. A fair and preferable allocation of the burden of proof on the existence of alternatives would place upon the plaintiff the burden of initially proposing or suggesting reasonable alternative practices while leaving to the employer the ultimate burden of demonstrating that any suggested alternatives are not adequate substitutes for its present practices." *Crockett*, 388 F.Supp. at 920.

Thus, we believe that the *Easley* and *Crockett* analyses should be adopted by this Court as the standard of proof on the alternative nondiscriminatory selection procedure question.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari and review the decision below on the reasonable alternative questions.

Dated this 25th day of November, 1985.

Respectfully submitted,

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APPENDIX
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 84-1834

RONALD A. GILLESPIE,

Plaintiff-Appellant,

v.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN and THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN.

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83-C-530-S—*John C. Shabaz, Judge.*

ARGUED FEBRUARY 13, 1985—DECIDED AUGUST 26, 1985

Before ESCHBACH, COFFEY, *Circuit Judges, and* SWYGERT, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* The plaintiff appeals the findings of the district court that the defendants' written employment test was job-related and further that the plaintiff failed to establish that other tests would serve the defendants' legitimate employment interests without a disparate impact on minority applicants. We affirm.

I.

Ronald A. Gillespie is the named plaintiff of a class of approximately forty unsuccessful minority applicants for the position of Personnel Specialist I or Personnel Manager I with the State of Wisconsin. The examination challenged by Gillespie was the first step in the hiring process for these positions. Candidates whose scores on the written examination were above an acceptable level were invited to an interview. Responses to the interviewers were evaluated by the respective interviewers and each candidate was given a score. The candidates' written exam scores and the interview scores were totaled with veteran and/or minority applicants having points added to their total scores. Based on these total scores, the candidates were ranked on a list of certified candidates eligible for appointment to vacant state positions.

The Wisconsin Department of Employment Relations ("DER") developed the new written examination in question as former tests utilized by the Department were previously held to have had an inordinate adverse impact on minority applicants. As an initial step in the test development process, the DER convened a committee of "job specialists" who not only had personnel experience in positions similar to the Personnel Specialist/Personnel Manager I positions but also supervised employees in these positions. The job specialists were asked to analyze the positions in order that they might determine what tasks were required of a Personnel Specialist/Personnel Manager I to perform and to identify the knowledges, skills or abilities necessary to perform these tasks. The job specialists delineated the skills, abilities and knowledges required

as: an ability to write standard English; interpersonal skills; decision-making; the ability to work under pressure; and the ability to establish priorities. After the committee reviewed and discussed the skills, abilities, and knowledge required, they rated each as to their respective importance.

Deborah Koyen, a DER employee specializing in recruiting and in developing employment examinations, utilized the list of knowledges, skills, and abilities to construct the written examination. In determining what form of test to implement, Koyen interviewed other government personnel departments concerning the type of test they utilize to screen applicants for entry level professional positions such as the Personnel Specialist/Personnel Manager I positions. After reviewing, weighing and considering their responses, the adverse impact of the previous test (the multiple-choice test), and the skills to be measured by the written test, Koyen decided to construct an essay type rather than a multiple-choice question and answer examination. The test written by Koyen was designed to test the applicants' abilities to use standard English and to analyze and organize information, leaving inter-personal skills to be tested at the interview level. The essay examination contained three questions. In the first question, the applicants were given a narrative description of a groundkeeper's duties and were given instructions on how to write a job description utilizing the narrative description. The instructions also contained an example of a complete job description. These extensive instructions on how to write a job description were also included in an instruction packet to be sent to applicants before the examination to aid the applicant in preparing for the exam. The second question directed the applicants to write a memo-

randum to another department member requesting certain information required for a departmental meeting. The third question presented statistical information about the minority enrollment in two schools and posed a hypothetical recruiting trip in which the recruiter, whose goal was to contact potential minority applicants, had time only to visit one school. The applicants were asked two questions: First, they were asked to choose which school to visit and to justify that choice. Secondly, they were asked what additional information about the schools they would like to have had before making their selection. Koyen presented the test to the job specialists and the committee agreed that the examination tested the necessary basic skills required for the position.

Furthermore, Koyen administered this test to lower level personnel specialists at the Division of Personnel to determine if the questions and the instructions were clear. Koyen also devised a grading system, established rating criteria, and trained graders to evaluate the examination. Koyen gave the graders sample examination answers to grade and examined the results of this trial grading to see if the graders understood the rating criteria and whether the respective graders applied the rating criteria in the same manner.

The test was given on February 9, 1980 to 451 applicants. Koyen divided the sixteen employees who were to grade the examinations into eight teams of two graders. The papers were distributed among the teams and each paper assigned to a team was evaluated by both graders. In addition, ten to twelve papers were given to all the grading teams. The teams were not told that all the

graders were evaluating these particular papers. Koyen ran statistical tests of the reliability of the scores both between and within the grading teams and found that the graders were reliable in their application of the rating criteria. Koyen and other DER employees next examined the scores to determine a proper cut-off point; only applicants whose scores were above the cut-off point would be invited to the interviews. In arriving at the cut-off score, the DER attempted to maximize the number of minority applicants to be invited to the interview while at the same time restricting the total number of invitees in order that the interviewers might not be overwhelmed. One hundred eighty-four candidates, including eleven minority applicants, were invited to the interviews and, after the completion of the interviewing and rating process, nine applicants, three of which were minorities, were offered positions.

Gillespie, at the time of the examination a Personnel Specialist I for the Wisconsin Department of Health and Social Services on a temporary basis for a year, was advised that he did not qualify to be advanced to the interview stage and lodged a complaint with the DER. Because of the complaint, Koyen had Gillespie's examination re-tabulated by a different team, unaware that they were re-evaluating a test previously scored. This re-evaluated test was rated three points lower than Gillespie's initial test result. Gillespie subsequently filed a charge of employment discrimination with the EEOC, commenced this action in the United States District Court for the Western District of Wisconsin, and received a determination in a bench trial that the written examination had an adverse impact on minority applicants. Advancing to the second

egy depends upon the type of inference the user wishes to draw from the test scores. Standards at 26; Anastasi at 152-54; Wollack at 403.

A. Appropriateness of the Choice of a Content Validation Strategy.

1. The Uniform Guidelines do not favor criterion-related validity.

Gillespie points to two sections of the Uniform Guidelines and the APA Standards as support for his contention that the Uniform Guidelines prefer criterion-related validity. According to Gillespie, the APA Standards, incorporated by reference into the Uniform Guidelines, express a preference for criterion-related validity by providing:

> "Other forms of validity are not substitutes for criterion-related validity. In choosing the test to select people for a job, for example, an abundance of evi-

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(Continued from previous page)

measure certain traits or characterictics thought to be relevant to future job performance. *Id.* at 403. An example of an employment test that would be validated by the criterion-related validation method is an intelligence test. The content validation strategy is utilized when a test purports to measure existing job skills, knowledge or behaviors. *Id.* "The purpose of content validity is to show that the test measures the job or adequately reflects the skills of knowledge required by the job." *Id.* For example, a typing test given to prospective typists would be validated by the content validation method. Construct validity is used to determine the extent to which a test may be said to measure a theoretical construct or trait. Anastasi, Psychological Testing, 144 (1982) (hereinafter "Anastasi"). For example, if a psychologist gave vocabulary, analogies, opposites and sentence completion tests to a group of subjects and found that the tests have a high correlation with one another, he might infer the presence of a construct—a verbal comprehension factor. Anastasi at 146.

> dence of the construct validity of a test of flexibility in divergent thinking, or of the content validity of a test of elementary calculus, is of no predictive value without reason to believe that flexibility of thinking or knowledge of calculus aids performance on that job."

APA Standards, at 27. Furthermore, Gillespie interprets § 1607.14C(5) of the Uniform Guidelines as reflecting a concern that content validated tests are inferior. Section 1607.14C(5) provides:

> "*Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure."

A review of the Uniform Guidelines and the relevant psychological literature reveals no preference for criterion-related validity. Section 1607.5 of the Uniform Guidelines provides: "For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines . . . ." *See also, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,* 44 Fed. Reg. 11,996 (1979) ("EEOC Questions and Answers") (Question 56: "Because the Guidelines describe the conditions under which each validity strategy is inapproprite, there is no reason to state a general preference for any one validity strategy"). Further, those psychometricians who have studied employment tests have determined that criterion-related validation is often impractable because of the lim-

ited numbers of employees available for test development and several measurement errors. APA Standards at 27; Anastasi at 433. Thus, neither the Uniform Guidelines nor the psychological literature express a blanket preference for criterion-related validity.

Furthermore, the sections of the APA Standards and the Uniform Guidelines that Gillespie relies upon fail to support his argument that criterion-related validity is preferred. The paragraph of the APA Standards Gillespie selectively quotes merely sets forth two basic principals of psychometrics: (1) the choice of validation strategy is dictated by the type of inference the user wishes to draw; (2) a test is irrelevant for employment testing purposes if the factor or trait it measures is not important for job performance. When read in its full and in its complete context, rather than in Gillespie's selective quotation, the paragraph cannot fairly be construed as expressing a preference for criterion-related validity. Furthermore, the Uniform Guidelines do not express a preference for criterion-related validity by admonishing users to check the reliability of a content validated test. Reliability is a technical term referring to the consistency of the test results. Anastasi at 102. All tests must be statistically examined for evidence of reliability before the test developer can establish the validity of the test. *Id.* Thus, § 1607.14C of the Uniform Guidelines emphasizes that a content validated test must be examined for reliability, just as criterion-related or construct validated test must be tested for reliability. Gillespie's argument that this admonition displays a preference for criterion-related validity results only from his reading the section out of context, and is without merit and displays merely a failure, or a refusal, on the part of Gillespie to grasp a basic principal of psychometrics—that *all* tests must be reliable.

2. Whether the choice of a content validation strategy was appropriate for the characteristics to be measured.

Gillespie points to the district court's finding that one purpose of the test was to measure an applicant's ability to prepare written position descriptions and argues that the testing of this ability was inappropriate because writing a job description is a skill readily learned within the first few months of employment. The Uniform Guidelines caution that, "[i]n general, users should avoid making employment decisions on the basis of measures of knowledges, skills or abilities which are normally learned in a brief orientation period, and which have an adverse impact." § 1607.5F. Use of tests which measure knowledge of factual information that will be acquired in a training program, "risks favoring applicants with prior exposure to that information, a course likely to discriminate against a disadvantaged minority." *Guardians Ass'n of New York City v. Civil Service Comm'n of City of New York*, 630 F.2d 79, 94 (2d Cir. 1980). A test must measure ability rather than factual information normally acquired during the training period. *Id.* The defendant in this action developed an extensive set of instructions for writing job descriptions and not only included these instructions with the test but also forwarded the instructions to the applicants before the test to aid the applicants in preparing for the exam. Specifically, the testimony at trial established that the defendants' express purpose in providing the instructions before the test was to remove the advantage some applicants may have gained from writing job descriptions in previous jobs, and to allow the applicants an opportunity to discuss the instructions with other persons,

plus giving the applicants the opportunity to practice applying the instructions. The district court found that the test was developed to measure the applicants' abilities. A district court's findings of fact will not be overturned unless it is clearly erroneous. Fed. R. Civ. P. 52(a). On the basis of this record, we hold that the district court properly found that the test measured abilities—i.e., the abilities "to communicate in standard written English [and to] prepare basic written position descriptions"—rather than factual information normally acquired during the training period.

The one argument of the plaintiff's that merits discussion is that "skills in decision-making and priority setting . . . are mere rephrasings of such traits as common sense and judgment, items specifically precluded from a content-validated examination." The Uniform Guidelines prohibit testing for constructs with a content-validated test:

> "A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, common sense, judgment, leadership, and spatial ability."

§ 1607.14C. The specific issue raised by Gillespie is whether a plaintiff sufficiently demonstrates that a content validated test attempted to measure a construct merely by alleging that the test's goals are "rephrasings" of a construct.

Gillespie's free use of the lay definitions of "skills, decision-making and priority setting" fails to acknowledge

that psychometricians and the Uniform Guidelines utilize operational definitions of terms. *See, e.g.*, §§ 1607.16A; 1607.14C(4); 1607.16T. The Guidelines specifically provide:

> "Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential)."

§ 1607.15C(3). By resorting to lay definitions of terms in his "rephrasing," the plaintiff asks the court to ignore the Guideline's explicit requirement that knowledges, skills and abilities be operationally defined. Furthermore, the plaintiff's reliance on lay definitions distracts attention from a critical question under Title VII in determining whether a content validation strategy could be used — whether the trait is too abstract to be measured with a content validated test. Accordingly, we hold that "rephrasing" the goal of the test as a construct is insufficient to prove that a content validated test attempted to measure a construct rather than existing job skills, knowledge or behavior.

The test for determining whether a characteristic is too abstract to be measured by a content validated test is given by the Uniform Guidelines:

> "[T]o be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and set-

> ting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles the work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity."

§ 1607.14C(4). Thus, the court must evaluate the test for: (1) the degree to which the nature of the examination procedure approximates the job conditions; (2) whether the test measures abstract or concrete qualities; and (3) the combination of these factors, i.e. whether the test attempts to measure an abstract trait with a test that fails to closely approximate the working situation. *Guardians,* 630 F.2d at 93; Wollack at 405-06.

After analyzing Gillespie's misstatements of the standards to be applied, we reach the ultimate issue of whether the content validation strategy adopted by the DER was appropriate under the circumstances. Both Deborah Koyen and Daniel Wallock, a testing expert employed by the DER, testified that the purpose of the written examination was to screen out those persons who did not possess the fundamental skills necessary to perform as a Personnel Specialist/Personnel Manager I. A test that screens candidates for fundamental skills may be validated by the content validation procedure. Wollack at 404-05. Furthermore, a review of the characteristics to be measured by the test and of the form of the test reveals that a content validation method was appropriate. The abilities to commu-

nicate in standard written English, to prepare a written job description, and to place the analysis of a recruiting problem in acceptable form are concrete, observable and quantifiable characteristics. Moreover, planning a recruiting trip and writing a job description and a memorandum closely simulate the actual work performed by a Personnel Specialist/Personnel Manager I. Because the test measured concrete characteristics in a form that simulated actual work behavior, we hold that the content validation procedure could be employed to validate the test.

B. Sufficiency of the Content Validation Study Conducted by the DER.

Gillespie argues that the job analysis performed by the DER as part of its content validation of the written test was inadequate, thus rendering the content validation study insufficient, because the job specialists were not trained in psychometrics and were unfamiliar with the job of Personnel Specialist/Personnel Managers I.[4] An examination of the Uniform Guidelines and the APA Standards fails to reveal that job specialists must be trained psychometricians. The function of the job specialist is to provide the test developer with a detailed description of the position and to weigh and identify the knowledges,

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[4] Additionally, Gillespie contends that the job analysis was inadequate because the relative importance of the qualities were not adequately measured. However, the DER employees' testimony support the district court's findings that "the job elements were ranked on the basis of the importance to the position, and a weighting was done as it concerns the critical elements." The findings of fact made by a district court will be upheld unless they are clearly erroneous. Fed. R. Civ. P. 52(a). Because the plaintiff is unable to show that the district court's finding that the job elements were ranked was clearly erroneous, it will not be set aside by this court.

skills and abilities needed to perform the job. Anastasi at 433. The only qualification for being a job specialist is knowledge of the position to be analyzed. *Guardians Ass'n of New York City v. Civil Service Comm'n,* 633 F.2d 232, 243 (2d Cir. 1980). The district court found that, "[a] number of persons skilled and experienced in personnel management were organized as a group of job experts for the purpose of determining the skill, knowledge and ability essential to the position of Personnel Specialist/Manager." An examination of the record reveals that the job specialists had either worked as Personnel Specialists or Managers or had supervised employees in these positions. Since the record amply demonstrates that the employees were knowledgeable about the positions, they were qualified to be job specialists. Because the position analysis was conducted by qualified job specialists who identified the necessary knowledges, skills and abilities required for the work and also ranked and weighted the elements as to the importance for the position, we hold that the plaintiff's contention that the position analysis was inadequate fails to find support in the record.

We turn now to Gillespie's second attack on the sufficiency of the content validation study, his contention that the skills measured by the test did not reflect the work done in the personnel positions. Gillespie alleges that the test was not representative of the tasks performed by Personnel Specialist/Personnel Managers I because the examination did not test all or nearly all skills required. Title VII does not require an employer to test all or nearly all skills required for the occupation. *Guardians,* 630 F.2d at 99. To be representative for Title VII purposes, an employment test must neither: (1) focus exclusively on a

minor aspect of the position; nor (2) fail to test a significant skill required by the position. *See, id.* Testimony at trial established that the ability to communicate in standard written English, to analyze and organize information, and to use these skills to write, edit or review job descriptions; to write memoranda; or to plan recruiting trips were vitally important in performing as a Personnel Specialist/Personnel Manager I; thus, the record reveals that the test did not focus exclusively on a minor aspect of the work. Moreover, the plaintiff does not suggest that the examination failed to test a significant skill required by the position. Accordingly, we hold that the examination was representative because it tested skills necessary for adequate performance as a Personnel Specialist/Personnel Manager I.

C. Reliability and Use of the Test Scores

According to the record, a pretest was conducted to determine whether the questions and instructions were clear.[5] Gillespie claims that the DER should have graded the pretest responses and correlated them with some measure of the pretestees' job performance. Correlating test

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[5] Gillespie argues that Koyen failed to correct problems revealed by the pretest—specifically, that the pretestees chose schools A and B in the recruiting question with equal regularity and that Question 1 failed to supply sufficient information to calculate percentages called for in the question. The record reveals that Koyen was aware of the problem with the recruiting question and discussed it with the graders. Furthermore, Gillespie's alleged problem with lack of information to calculate the percentages asked for in Question 1 was not identified either by the pretestees or the graders; indeed, the "problem" only appears in Gillespie's strained reading of the instructions. We hold that the plaintiff's allegation that the defendant ignored problems revealed by the pretest is not supported by the record.

scores of present employees with a measure of their job performance is a form of criterion-related validity (concurrent validation), APA Standards at 26, and is not required in a proper content validation study. *See id.* at 45-56; Uniform Guidelines at § 1607.14C. Furthermore, the defendants' expert testified that the number of employees taking the pretest was so small that a correlation between the test scores and job performance would be statistically meaningless. The expert's opinion that the sample size was too small to support a statistically meaningful correlation between the pretest scores and present work performance is confirmed by the psychometric literature on sample size. *See generally* Schmidt, *The Future of Criterion-Related Validity*, 33 Personnel Psychology 41 (1980). After review, we hold that the defendant properly analyzed the pretest responses and was not required to correlate the pretest scores with a measure of job performance.

Gillespie also argues that the cut-off score was not logically chosen and that the DER improperly used the scores on the written examination to rank-order the applicants. An employer using a test to screen job applicants must fulfill two requirements to justify the choice of a cut-off score: The test scores must be reliable, *Guardians*, 630 F.2d at 101-02, and the employer must have some justifiable reasoning for adopting the cut-off score. *Id.* at 105; APA Standards at 66-67. Grader reliability is determined by having a sample of test papers independently scored by two examiners and correlating the two scores thus obtained by each examinee. Anastasi at 117-18. An employer may establish a justifiable reason for a cut-off score by, for example, "using a professional estimate of the requisite

ability levels, or, at the very least by analyzing the test results to locate a logical 'breakpoint' in the distribution of scores." *Guardians,* 630 F.2d at 105. Koyen testified that two examiners graded each applicant's paper. Additionally, all of the examiners scored one batch of papers. Koyen statistically analyzed the test results to determine how well each grader's score correlated with the other grader on the team. Further, Koyen's examination of the scores of the tests that were graded by all of the examiners determined how well the teams correlated with one another. Thus, the record reveals that Koyen determined the reliability of the scores with recognized psychometric techniques. Furthermore, Koyen and Wallock testified that the cut-off point was selected in order that the DER could interview as many minority candidates as possible while at the same time assuring that the candidates possessed the minimum skills necessary to perform as a Personnel Specialist/Personnel Manager I. In addition to selecting as many qualified minority applicants as possible, the cut-off score was set so that the interviewers would not be overwhelmed by the sheer number of candidates. Therefore, the record demonstrates that the DER's cut-off score was based upon an estimate of the ability levels needed, maximized the number of minority candidates and preserved the integrity of the interview process. The plaintiff has failed to demonstrate that the cut-off score chosen by the DER was illogical and unjustified.

Finally, we turn to Gillespie's contention that the DER improperly used the written examination scores to rank-order the applicants. "Use of a selection procedure on a ranking basis may be supported by content validity if there is evidence from job analysis or other empirical data

that what is measured by the selection procedure is associated with differences in levels of job performance." EEOC Questions and Answers, Q. 62. Gillespie contends in his appellate brief, that the testimony of his expert, Dr. Raynor, established that the written examination score caused a disparate impact on the final, rank-ordered score. However, on cross-examination Gillespie's own expert witness stated that his testimony had not addressed the questions of whether "there was any statistically adverse impact as to the composite exam or as to the oral exam." We hold that the plaintiff failed to demonstrate that the use of the written exam scores in determining a final score caused a disparate impact on minority applicants.

D. The Plaintiff Failed to Produce an Alternative Test.

Gillespie contends that the DER could have employed an essay examination that sought short answers to a large number of questions; could have developed a multiple-choice test; or could have utilized a commercially developed test. However, this bare assertion, without any supporting examples, much less supporting data, that using other tests was possible fails to satisfy the plaintiff's burden of demonstrating that other tests or selection devices without a similar undesirable racial effect would also serve the employer's legitimate interests; specifically, the plaintiff fails to demonstrate that each of these hypothetical alternatives would have adequately measured the applicant's ability to communicate in standard written English or the ability to organize and analyze information. Furthermore, Gillespie's suggestion that the DER should have used a multiple-choice test ignores Koyen's testimony that the DER previously used multiple-choice tests and found that

there was a disparate impact on minorities. Finally, Gillespie's bald assertion that commercially available tests are valid ignores requirements imposed on the employer by the Uniform Guidelines. An employer may support the use of selection procedures with validity studies conducted by test publishers if: (1) the validation study is conducted in accordance with the requirements of the Uniform Guidelines; (2) the job analyses of both the employer's job and the job performed by the subjects on which the publisher developed the test reveals that both groups performed "substantially the same work behavior"; (3) the publisher's validation data includes a study of test fairness; and (4) the employer is satisfied that other variables will not significantly affect the publisher's validation study. § 1607.7. Gillespie's mere assertion that commercially developed tests were available to the DER utterly fails to meet the requirement of establishing that the utilization of the test publisher's validity study would be proper.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 26, 1985.

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
AUGUST 26, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

No. 83-C-530

RONALD A. GILLESPIE,

Plaintiff-Appellant,

NO. 84-1834 vs.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN and THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

Judge John C. Shabaz

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, - - - - - Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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JUDGMENT ON DECISION BY THE COURT

FOR THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION 83-C-530-S

RONALD A. GILLESPIE,

Plaintiff,

vs.

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEPARTMENT OF EMPLOYMENT RELATIONS,

Defendants,

JUDGMENT

This action came on for consideration before the court, United States District Judge John C. Shabaz presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged that judgment is hereby entered in favor of the defendants DISMISSING the complaint with prejudice and costs.

Dated at: Madison, Wisconsin Date: April 16, 1984

/s/ Joseph W. Skupniewitz
Clerk of the Court

———o———

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-C-530-S

RONALD A. GILLESPIE,

Plaintiff,

v.

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEPARTMENT OF EMPLOYMENT RELATIONS,

Defendants.

MEMORANDUM AND ORDER

(Filed April 16, 1984)

This is an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., which seeks declaratory, injunctive and monetary relief on behalf of plantiff Ronald A. Gillespie and the class of minorities whom he represents.

Although the complaint generally refers to the defendants, Wisconsin Departments of Health and Social Services (DHSS) and Employment Relations (DER) having intentionally engaged in a pattern, policy or practice of discrimination based on race and color in employment opportunities, nonetheless the action is one of disparate impact.

The case was the subject of a bifurcated trial to the Court on March 19-21, 1984, with the understanding that the issue of liability would be first determined by the Court before a determination would be made as to those

damages which may have been sustained. All testimony as to both liability and damages was completed on March 21, 1984 and the parties, at the Court's direction, submitted supplemental data pertinent to damages on April 2 and April 3, 1984.

The Court has jurisdiction under both 28 U.S.C. §§ 1343(4) and 1332.

Specifically, the plaintiff claims that the defendants utilizing hiring criteria, i.e. written tests, which had a disparate impact on minority job applicants for the positions of Personnel Specialist/Manager, and the tests were not job related.

At the outset the Court will state it has no hesitancy in finding that the written tests did indeed have a disparate impact on plaintiff and the class of minority members which he represents. In final argument, defendants had difficulty in maintaining a contrary position based upon the evidence, which showed that the written examinations for the position of Personnel Specialist/Manager 1 eliminated minorities from further consideration at a statistically higher rate. The Court further finds, with the same degree of certainty, that the tests were job related.

Finally, upon its examination of all the exhibits and testimony offered, the Court is of the opinion that plaintiff has not presented sufficient evidence tending to show that different tests would not only adequately serve the defendants' interests, but avoid a disparate impact as well.

FINDINGS OF FACT

1. Plaintiff, Ronald A. Gillespie, is an adult black male citizen of the United States, who was born on June

20, 1948, and who currently resides at 616 Ralph Drive, Raleigh, North Carolina, 27610.

2. Mr. Gillespie was employed with the State of Wisconsin, Department of Health and Social Services as a limited term employee between March of 1979 and September of 1981 as a Personnel Specialist/Manager.

3. In September of 1981 Mr. Gillespie departed from his limited term employment with the State of Wisconsin and became employed as a Personnel Analyst with the Office of State Personnel Local Government Services in the North Carolina State Service.

4. The defendant State of Wisconsin is a sovereign state with its principal place of business at the State Capitol, Madison, Wisconsin.

5. The defendants, Department of Health and Social Services, and the Department of Employment Relations are governmental agencies of the State of Wisconsin, with their principal place of business at One West Wilson Street and 149 East Wilson Street, respectively, Madison, Wisconsin.

6. On July 24, 1980, the plaintiff Ronald Gillespie personally filed charges of unlawful discrimination with the State of Wisconsin Personnel Commission no more than 300 days after the alleged discrimination and causes of action arose as required by Wis. Stat. § 11.36 and filed such charges with the Equal Employment Opportunity Commission (EEOC) within 300 days after the alleged unlawful practice occurred pursuant to Title VII of the Civil Rights Act of 1964, as amended.

7. On March 16, 1981, the State of Wisconsin Personnel Commission issued an initial determination by Rob-

ert E. Gregg, Equal Rights Officer, that there was probable cause to believe that discrimination had occurred.

8. On March 7, 1983, the plaintiff, Ronald Gillespie, received the notice of right to sue within 90 days issued by the United States Department of Justice, Herbert A. Goldsmith, Jr., attorney, pursuant to Title VII of the Civil Rights Act of 1964, as amended.

9. This action was commenced within 90 days following receipt of the right-to-sue letter.

10. Wisconsin is a deferral state and the State of Wisconsin Personnel Commission is the state agency empowered to process discrimination charges as they relate to employment by the State of Wisconsin.

11. Prior to January 31, 1980, the plaintiff, Ronald Gillespie, applied for a permanent position with the State of Wisconsin as a Personnel Manager/Specialist.

12. On February 9, 1980, the State of Wisconsin conducted a written examination of applicants for the position of Personnel Manager/Specialist 1 and the plaintiff, Ronald Gillespie, took such examination.

13. As a result of his failure to achieve an adequate score on the written examination, the plaintiff Gillespie was not certified for further consideration for the permanent position of Personnel Manager/Specialist in the Civil Service of the State of Wisconsin.

14. At all times relevant herein, the defendants were employers within the meaning of Title VII of the Civil Rights Act of 1964, as amended.

15. During his period of employment, the plaintiff Gillespie satisfactorily performed the duties of Personnel Specialist/Manager on a limited term basis.

16. The written examination administered to plaintiff and other applicants for the position had a disparate impact by eliminating minorities from further consideration at a statistically higher rate. 451 candidates took the written examination. 403 were white, and 48 were minority group members. 173 white applicants and 11 minority applicants were certified to the second stage.

This indicates that 42.95% of the white applicants passed the written examination and received a chance for further consideration. If minority applicants had been certified at the same rate there would have been 20.6 on the further consideration list. Applying the 80% rule, there should be a permissible number of 16 minority candidates on the list. There were only 11.

Consequently, the plaintiff and class members were not hired for the several positions of Personnel Specialist/Manager 1. The defendants, however, continued to seek and hire other persons for these positions.

17. The position of Personnel Specialist/Manager 1 was posted statewide and was described, in part, as follows:

> *SKILLS REQUIRED:* analytical, organizational and decision making skills; skill in working under pressure and establishing priorities; interpersonal skills to establish and maintain productive working relationships with a wide variety of people in various situations; effective oral and written communication skills. *Wisconsin Residence is Required.*

18. The written test was prepared by employees of DER who had training in test preparation, were familiar with the knowledge, skills and abilities necessary for the position and had personal knowledge of the duties of Personnel Specialist/Manager. Additionally, a job analysis of the position was performed by DER and minority members participated in all of these processes.

19. The written examination administered to all applicants for the positions was developed, among other things, to determine abilities to communicate in standard written English; to prepare basic written position descriptions; to place the analysis of a recruiting problem in an acceptable written form; and to identify fundamental and basic skills which are required to perform duties of the position.

20. All applicants were advised by memorandum from the Department that a written essay examination would be given and that an oral examination would be provided to those most successful. They were advised, among other things, that the examination would consist of three questions designed to measure their analytical and organizational skills, written communication skills, skill in decision making, and skill in working under pressure and setting priorities.

21. The specific questions were not culturally biased. Question 1, related to the position of grounds keeper. It appears to the Court that this reflects the understanding that about half of all United States households have gardens, to include urban gardening plots.

22. The plaintiff Gillespie, in his letter to the Personnel Commission dated March 19, 1980, does not contend

that the questions asked were not job related or invalid. Instead, he questioned the scoring methods, qualifications of the raters, and the entire grading process.

23. Plaintiff Gillespie's written examination was rescored by another team, which was unaware of the first scoring. The second result was substantially the same as the first, plaintiff scoring three points lower the second time around.

24. The examination was job related, and it was designed to directly measure specific skills important to job perforcance.

25. The essay format was utilized as an alternative to multiple choice tests and other types of essay approaches. Concern existed in the Department that the previous tests for Personnel Specialist 1 and Manager 1 given in 1978 or 1979 had an inordinate adverse impact on persons of minority groups.

26. As early as November 29, 1979 meetings were scheduled of job experts for the purpose of recruitment and examination development. A recruitment committee was established, as was an examination committee. Numerous meetings were held by each committee. A number of persons skilled and experienced in personnal management were organized as a group of job experts for the purpose of determining the skill, knowledge and ability essential to the position of Personnel Specialist/Manager.

27. At those meetings discussions were held concerning the tasks to be performed by the Personnel Specialist/Manager. Determinations were made as to those skills, knowledge and ability required to perform those

tasks. Further, these job elements were ranked on the basis of their importance to the position, and a weighting was done as it concerns the critical elements. Finally, an examination review and limited pre-testing was conducted to determine that the examination closely approximated the elements of work identified with the position. The written examination selected was content validated.

28. Other alternatives were studied and rejected, including multiple choice, the original in-place test, only essay, only oral, and those others which may be commercially available. Other tests were rejected for several reasons, to include financial, reliability, difficulty in validating, and that they may be the cause of adverse impact.

29. The examination finally adopted contained the questions that the committee believed best tested for the basic skills required in the position.

30. The examination is not to be used again for reasons of security.

31. The plaintiff has failed to show that other tests without a similarly undesirable disparate impact would also serve the defendants' legitimate interest in obtaining qualified applicants for those positions available.

32. Although the highest standard expected by experts with 20/20 hindsight was not obtained for the written test, nonetheless the test procedures utilized were adequate.

33. The content validity procedure is found to be in accordance with EEOC guidelines, and there has been no evidence to indicate that other tests within those guidelines suggested by plaintiff would eliminate the disparate

impact and meet the legitimate employment objectives of the defendants.

MEMORANDUM AND CONCLUSIONS OF LAW

Although after careful discussion, study and deliberation the defendant Departments did not foresee its consequences, nonetheless the written examination provided plaintiff and others resulted in a disproportionate failure rate for minority applicants. The examination, however, was job related.

Plaintiff's claim, of course, does not involve an assertion of purposeful discriminatory motive; instead, that the facially neutral written examination disproportionately excludes minority members from attaining further job certification. The elements of the prima facie case are discussed as follows:

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs v. Duke Power Co., supra,* at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co. v. Moody, supra,* at 425, quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801.

Dothard v. Rawlinson, 433 U.S. 321 (1976).

Plaintiff has established his prima facie case. The defendants have met their burden by showing the exami-

nation to have a manifest relationship to the hiring in question; it is job related. They have done this by demonstrating that the tasks on the examination substantially represent equivalent tasks on the job. EEOC guidelines appear to provide that evidence of content validity of an employment test may be accepted as evidence of job relatedness for tests that consist of suitable samples of the essential knowledge, skills, or behavior composing the job in question. Here job relatedness is determined where the criteria for selection are clearly identified. The criteria are specific, and the defendants have offered articulable standards to guide the application of these criteria. The Court is of the opinion that the EEOC guidelines were, indeed, followed, and that the examination review phase demonstrated that the examination for the position was significantly correlated with those elements of work behavior identified in the job-analysis phase.

Where it has been determined that the examination was job related, the plaintiff must then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in efficient and trustworthy workmanship." This has not been done. The fact that other tests with more questions may have been available does not satisfy plaintiff's burden. The fact that experts testified that the test and its procedure did not meet the highest standard does not assist plaintiff in meeting his burden, particularly where the test and procedure utilized were adequate.

> Title VII prohibits him [employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority

> employees. To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 US., at 802.
>
> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it preceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1977).

Where, as above, the Court cannot require the employer to adopt what it perceives to be the best hiring procedure available, neither can the plaintiff; although, of course, his worthwhile suggestions are to be considered.

Briefly stated, the defendant did not foresee that the test might have a disparate impact on minorities. Where plaintiff has met his prima facie case, the defendants must prove, as they have done here, that the written examination and the attendant procedures were job related. Where this has occurred,

> it remain[ed] open to [Gillespie] to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."

Dr. Joseph Carpenter v. Board of Regents of the University of Wisconsin System, Case No. 79-C-207, slip opinion at 6 (7th Cir. February 23, 1984).

The plaintiff having failed to meet its burden, judgment must be entered in favor of the defendants.

Because the plaintiff has not prevailed in the liability portion of this bifurcated trial, damages cannot be considered.

Accordingly,

ORDER

IT IS ORDERED that judgment be entered in favor of the defendants DISMISSING the complaint, with prejudice and costs.

Entered this 13th day of April, 1984.

BY THE COURT:

/s/ John C. Shabaz
District Judge

PERSONNEL SPECIALIST/MANAGER 1
ESSAY EXAMINATION
TIME LIMIT: 2 HOURS

NAME (PRINT): .....

SOCIAL SECURITY #: .....

SIGNATURE: .....

* * *

Instructions for Question # 1

For this question you will be asked to utilize the information on writing position descriptions sent to you with your examination notice. The same information is reprinted below for you to refer to if necessary. Question # 1 will ask you to write part of a position description from a narrative describing a portion of a job.

Purpose of the Position Description

A good position description is a written structured statement describing the job components of a given position. It will tell the reader what the worker does, how, and why.

The position description is a management tool with a number of functions, including assignment of duties, classification of the position, performance evaluation, training and development, and recruitment and selection. An employer can not measure an applicant's qualifications or a worker's performance unless criteria for such measurement have been developed. A completed position description provides information needed to develop such criteria, and helps to ensure that they will be directly related to the job.

Format of the Position Description

A. Goals and Worker Activities

The position description format focuses on the goals (work outcomes) and worker activities (work behaviors)

of the position. The development of the position description begins with the determination of the goals.

Goals describe the purpose of each employe's work. They are synonymous with the accomplishment or output each employe is expected to produce and should make explicit the reason why the position exists. Goals may be viewed as the areas of responsibility of the position.

Worker activities describe in specfic terms what the employe is expected to do while at work. It is important that these statements contain sufficient information to make them understndable to a person who is not particularly familiar with the work to be performed. Normally these statements will describe worker behavior that is observable or whch results in an observable product.

B. Structure of Goals and Worker Activity Statements

Goal statements and worker activity statements are written according to an identifiable grammatical structure. Past experience has shown that use of this grammatical structure most effectively conveys an understanding of the job.

1. The structure for Goal Statements is:

   Noun/Prepositional Phrase
   examples:
   Maintenance of air conditioning system.
   Supervision of professional staff.
   Development of training programs.

2. Guidelines for writing goal statements:

   a. Goal statements begin with a noun and reflcet work outcomes.

   b. For each position description there usually will be between 2 and 6 goals.

   c. Goal statements are listed in descending order of importance.

3. The structure for Worker Activity Statements is:

   Verb/Object of the Verb/Output (purpose)
   examples:
   Interview public assistance applicants to determine if they meet established criteria for aid.
   Operate machine to fold, seal and stamp outgoing mail.
   Evaluate job performance to determine employee's eligibility for performance awards.

4. Guidelines for writing worker activity statements:

   a. Worker activity statements begin with specific action verbs.

   b. All of the important worker activities should be listed under a goal. For most goals 2 to 8 worker activity statements should be adequate to describe the work performed. A long list of worker activities becomes cumbersome and should be consolidated or generalized.

   c. Verbs of vague or multiple meaning should be avoided. Some examples include:

assist	perform
assume	responsible for
handle	support
maintain liaison	serve as
patricipate	use
prepare	work with

   d. Worker activities are listed under each goal in sequential order of performance whenever possible.

   e. Worker activity statements should describe the position completely enough to give an understanding not only of the duties, but also the complexity, level of responsibility and authority, and

the skills and abilities necessary. This will be done through the use of modifying words and phrases.

C. Summary Statement

The purpose of this statement is to summarize the goals and provide information which applies to the entire position such as the level of accountability, level of supervision given and/or received, independence of decision making and the relationship to other positions with similar goals.

D. Indexing

The goal statements are identified by capital letters. The worker activities listed under a goal are identified by the letter of that goal and the sequential number of that worker activity in the list (A1, A2, A3, etc.).

E. Time Percentages.

Time percentage estimates are made for the goal statements and the major worker activities. Estimates should be made for worker activities constituting 10% or more of the workload. The estimates indicated are based on the amount of time contribtued toward the whole job, not toward a particular goal.

ABBREVIATED SAMPLE OF A POSITION DESCRIPTION

POSITION SUMMARY: Supervise five professional staff of the agency personnel department in the areas of classification, compensation and staffing. Reports to the Chief of the Personnel Office. This is a medium-sized agency with full delegation of personnel functions from the Director.

25% Goal A. Definition of the major goals or accomplishments expected of each employe supervised.

10% A1. Define the role of the personnel department as a member of the management team, to relate the department to the overall program goals of the agency.

A2. Assign work to employes supervised in a manner that is consistent with each employe's job classification level and abilities to promote efficient achievement of the department's goals.

10% A3. Discuss departments goals and work assignments with employes to alleviate problems and resolve potential grievances.

40% Goal B. Evaluation of the extent to which each employe is attaining the defined level of accomplishment.

10% B1. Establish performance standards for each objectve of each employe using participative management techniques to jurge employe effectiveness.

15% B2. Monitor the work of employees supervised to insure productivity standards are maintained.

B3. Provide guidance and counseling as necessary to achieve improvement in employe performance.

Question # 1

As a Personnel Manager, one of your responsibilities is to write and assist supervisors in writing position descriptions for employes of your institution. Assume that, upon going through your files, you find that a position description for Mary Doe, a Groundskeeper at your institution, is missing. You are unable to locate any copies, so you decide to write a new position description. You interview the employe and ask her to describe what she does. The following is what she tells you to explain one part (one goal) of her job:

> Well, the part of my job I like most is working with trees and shrubs. I spend about 2 hours each day working with them. You see, in order to keep our trees and shrubs healthy and looking good, they have

to be constantly checked and maintained. In the spring, I prune the trees, making sure I paint each cut with a dressing of tar mixed with fungicide. I go around and look for broken and damaged branches, and cut these off first. I also either pound fertilizer stakes into the ground around the tree, or dig in granular fertilizer around the dripline. We do this for each of the younger trees each spring. I check the width of the trunk and the age of the tree to determine how much fertilizer to use.

We also plant new trees and shrubs in the spring. I dig the hole, put a fertilizer packet in, place the tree at the rght depth and cover the roots with soil. Then I spread a mulch of wood chips around the base of the trunk. In the summer, I water the recently planted trees and shrubs when it gets hot and dry, usually at least once a week during a drought. Oh, and I also clip the hedges and do renewal pruning on our shrubs in the spring.

During the summer, we inspect all the new trees, the fruit trees, and especially the elm trees weekly for signs of disease. If I recognize a problem, I tell my supervisor. She's the expert in plant diseases, and she's got a license to apply all the chemicals. I usually help her mix up whatever chemical she decides to use and help her spray or inject it. We use a power spray with a 200 gallon tank. After spraying, I rinse out the tank, check the engine and make sure the machine is ready to be used again.

When there is a big thunderstorm, we usually find that some limbs have broken, and maybe even a tree was blown down. Then I saw any fallen trees up, cut any broken branches out, load up the wood and haul it away. You have to cut broken limbs back to the trunk and then dress the wound. Usually we use a chain saw for this. We also cut dead elm trees down in the winter. We rent winches or one of those trucks with the bucket that can reach up into the trees, and then I or the supervisor cut all the limbs off. Then

we cut the trunk down. We don't work outside when it's real cold, though. Then we stay in the shop and repair the equipment. I especially like to sharpen the chain saw blades.

Using this narrative, write *one* goal statement, the worker activity statements, and identify time percentages, if appropriate. Remember ,the information is to represent only one (1) goal of this position. Label it Goal A. Write your response to this question on the white lined page provided on the back of this booklet which is labeled Question # 1. (A Position Summary will *not* be necessary.)

Question # 2

You are a staff member in the personnel office of a major state agency of the State of Wisconsin. It is the responsibility of your office to provide a wide range of personnel servces to various program units in your agency. One of the services that you provide is to analyze and recruit for job vacancies and to develop recruitment strategies for subsequent employment of candidates.

Your supervisor was contacted by Mr. Henning, from the Division of Public Assistance, to discuss plans for the recruitment and selection of a large number of staff for the implementation and administration of a federally funded Low Income Energy Assistance Program. The purpose of the program is to provide emergency monetary assistance to low income families throughout the State of Wisconsin for heating their homes during the winter months. The program is new and the vacancies must be filled immediately. However, the program is not expected to recur beyond the crurent heating season and all employes hired for its implementation will be released in approximately six months.

Mr. Henning and your supervisor have arranged a meeting to discuss how to proceed with recruitment for these positions. In preparation for that meeting your supervisor has asked that you prepare a memorandum to Mr. Henning outlining what information you will need regarding the Low Income Energy Assistance Program and the positions in order to initiate recruitment.

Write your response to this question on the white lined pages provided on the back of this booklet labeled Question # 2. (*NOTE:* Do not use your name in the memorandum.)

Your response to this question will be evaluated for writing skill as well as content.

Question # 3

Assume that you are a state job recruiter and are planning a trip to St. Louis, Missouri to recruit minority graduates for Wisconsin State Government. You have time to visit one school. You have the following information about schools *A* and *B:*

	School A Seniors	%	School B Seniors	%
Black	158	1.4	141	16.6
Asian American	46	.4	34	4.0
Hispanic	37	.3	31	3.7
American Indian	29	.3	24	2.8
Other (Non-minorities)	10,751	97.6	618	72.9
TOTAL	11,021	100.0	848	100.0

Part A. At this time you are interested in attracting minority graduates into Wisconsin State Government. Based *solely* upon the information given in the chart, which school would you visit? What are the reasons for your answer?

Part B. What types of *additional* information would you like to have to make a better decision on which school to visit? (List as many types of additional information as you can, and briefly explain your reasons for wanting each type of information.)

Write your response to questions 3A and 3B on the white lined pages provided on the back of this booklet labeled Question #3.

Your response to this question will be evaluated for writing skills as well as content.

(EXHIBIT 4)

———o———

CHAPTER 230

ESSAY EXAMINATIONS

* * *

B3. *A large number of questions each of which demands a short answer is often preferable to a small number of questions calling for long answers.*

An essay test including a large number of questions, say ten to fifteen, in contrast to a test of one to four questions, has the advantage of more adequate sampling of the job content concerned. Also, questions designed for briefer answers are usually more precise. Sometimes it is practical to convey to the applicant the desired length of answer or amount of detail by duplicating the questions on sheets that contain appropriate space for answering each.

* * *

B8. *Essay tests work best with relatively small numbers of test takers.* When there are fewer than 15 test takers, it saves time to construct and score an essay exam rather than a multiple-choice exam. When there are between 15 and 30 test takers, there is no practical advantage for either type of test in terms of construction and scoring time and consequently the decision between them should be made on other grounds. When there are more than 30 test takers, the practical advantage shifts to the side of the multiple-choice test which is very easy to score but time consuming to construct. With large numbers of applicants (50 or more), time needed for careful grading of essay exams

becomes prohibitive; the multiple choice having a clear advantage under such circumstances.

• • •

F. Many authorities would probably agree that errors in grammar, punctuation, or spelling not be penalized—dictionaries are readily available in most work settings, people are frequently adept at avoiding words they cannot spell choosing reasonable substitutes instead, and the secretarial pool may be expected to provide assistance on these aspects of professional writing.

• • •

C. Agencies, large and small, are also encouraged to make a quick check for evidence of adverse impact. The following is a suggested procedure based on EEOCC's "80%" rule[3]:

Competitors	# Accepted, Recomm. or Successful	% Accepted, Recomm. or Successful	Decision
		A	
Protected Group (Identify)		Remaining Group % Accept. X .80	A B no adverse impact
		b	
Remaining Group		B	A B possible adverse impact

[3]Based on the July, 1976, EEOCC definition of adverse impact: "a selection rate for any racial, ethnic, or sex group which is less than four-fifths (4/5) or 80 percent of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded as evidence of adverse impact."

1. Tabulate and record the number of competitors for both protected and remaining group.

2. Tabulate and record the number of competitors accepted (recommended, hired) for both protected and remaining group.

3. Separately compute and record (at A and b) the percentage successful in both groups.

4. Multiply the successful percentage for the remaining group (figure at b) times .80 and record the results at B.

5. Compare the percent successful in the protected group (A) with the value computed in (B), and record your decision in the right-hand column. If A is greater than or equal B, the procedure by definition did not have an adverse effect on the protected group. However, if A is less than B, there is a possibility of adverse impact, and the Bureau is available to provide advice and consultation.

Failure to satisfy the 80% rule should make the personnel professional suspicious of the process employed although the most widely accepted definition of test bias does not consider evidence of adverse impact alone as competent evidence for documenting the unfairness of a selection procedure. Evidence of adverse impace is sufficient for a prima facie case, however. At any rate, periodic checks on the number of minorities or women successful along with the jobs they are recommended for may alert one to possible bias. Again, the Bureau is available to provide advice and consultation.

(EXHIBIT 11)

85-919 (2)

No.

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

RONALD A. GILLESPIE,

Petitioner,

v.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN and THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The employment test challenged in this matter was a two-part examination. The first part of the examination was a

written essay examination with five major questions. The major questions contained subitems, or benchmarks, and the scorers of the test looked for the subitems in the essay scoring. The effect of the sub items was similar to having a larger number of questions (Tr. 1-70).

A major goal of the written part of the examination was to determine the ability of the applicants to write in standard English (Pet. App. 29A). The job experts who were gathered to prepare the examination concluded that a personnel specialist had to be able to communicate in acceptable standard English.

The group of job specialists that prepared the examination consisted of persons involved in the performance of personnel work or supervisors of persons involved in personnel work. The test was

to select a personnel specialist. The group included minorities.

The second part of the test was an oral interview. A reason for a two-part test was to eliminate persons who were clearly unacceptable, while at the same time allowing evaluation of non-verbal attributes among the group who showed minimal acceptability. The final hiring based upon the two-part test was not statistically discriminatory, and of the nine eventually hired three were minorities.

The written test was not used to rank the candidates, except for those who passed the cutoff point. The test results beyond the cutoff point did not support a prima facie case, and were not statistically discriminatory.

The test used in this instance was developed as an essay test when a previous multiple choice test, used for a similar group of personnel classifications demonstrated a disparate impact (Pet. App. 30A).

The "gardener" example for the first question of the written test, which involved writing job description specifications, was selected as a reasonably common area of activity for the applicants to discuss. The district court found that the questions were not culturally biased (Pet. App. 29A).

The defendant's test developer-experts studied and rejected other test alternatives, including multiple choice, essay only, oral only, and commercially available tests (Pet. App. 31A).

The plaintiffs failed to show that other tests without a similarly undesirable impact would also serve the employer's needs (Finding 31, Pet. App. 31A; Pet. App. 34A & 35A; Pet. App. 20A & 21A).

ARGUMENT

The petitioner contends that there is a conflict among the circuits concerning the placement of the burden of proof concerning "alternative selection" processes. Petitioners' base their assertion of conflict upon their own "subtle" interpretation of a part of a paragraph, read out of context, from Easely v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985).

Any reasonable reading of the language in Easely must indicate that the

Eighth Circuit is in direct accord with the position of this court and of other circuits in allocating the burden to the plaintiffs, after the prima facie showing has been made and responded to by the employer, to "then show that other practices, which lack a similarily discriminatory effect, would satisfy the employer's legitimate interests." Easely, id., at 255, n. 7. In Easely, the court further noted that such a showing could be "some evidence that the employer was using the practice as a mere pretext for discrimination."

The language which petitioners assert somehow created a "subtle" shift in the allocation of the burden, is from page 256 of the Easely decision. That language is in a paragraph that begins

with a recitation of the findings by the district court that the employer had "failed to demonstrate that the test was a valid selection device that was justified by a business necessity. ..."

Footnote 7, noted previously, is referenced to the same paragraph. Read in context, it is clear that the Eighth Circuit did not make some "subtle" shift in the law governing the burden of proof in disparate impact cases, and/or the burden of showing the availability of alternative test devices. Easely holds that once business necessity has been demonstrated, as it was here, the plaintiff has the right to show that the necessity was simply a pretext, and may seek to make such a showing using indirect proof, i.e., that the employer had other similar alternatives that could have been used. The process set forth by

this court in Albermarle Paper Co. v. Moody, 422 U.S. 405, 446-447 (1975), and cited in Easely, i.d., 255, describes the burdens of going forward and does not alter the burden of proof of discrimination which remains on the plaintiffs. And whatever "showing" is made is evidentiary in nature to be considered and weighed by the trier of fact. In Easely, the Eighth Circuit was reviewing district court findings which included findings that the employer had faled to perform a proper job analysis or validate the tests used. The additional finding that the employer in Easely had an available selection device was not necessary to the ruling; it was however some evidence to sustain the lower courts finding of discrimination.

Moreover, unlike this case, the plaintiffs in Easely had identified not

only a specific selection method but had proven to the satisfaction of the district court that the alternate selection process did not in fact produce a statistically disparate effect in actual hiring experience. Easely v. Anheuser-Busch, Inc., 572 F. Supp. 402 (E.D. Mo. 1983) at 410, Finding 36.

Contrary to Petitioner's contention, it is appropriate that the complainant have a burden of doing more than merely making a "bare assertion" of an alternative method of testing (Pet. App. 20A) in order to show the availability of an acceptable alternative selection device. While one might hesitate to promote the "alternative" method described in Easely (hiring solely on the basis of a review of applications and one or more interviews, Easely at 410) it included at least a specific example and

supporting data on the actual effect of a specific example.

As both the district and circuit courts held here, this petitioner did not make a similar showing.

Petitioners contend that the circuirt court holding would require the complainant to "validate" an alternative test in order for it to be considered. It is not necessary to determine if a plaintiff is required to "validate" alternative selection device. In this instance the plaintiffs fell far short of any arguable level of proof. The circuit simply agreed with the district judge that a "bare" assertion was not sufficient to constitute a showing of a reasonable alternative. The court of appeals observed that not only hadn't the petitioners presented a specific test,

but they had also failed to present any data to show that such an alternative would meet the needs of the employer and not produce disparate results.

I. The Petitioner Failed To Show An Alternative Selection Device.

This court has clearly held that the burden of proof remains upon the plaintiff to show that other selection devices without a similar discriminatory effect would also serve the employer's interest. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albermarle Paper Co. v. Moody, at 425. In this case, the plaintiffs did not present any testimony of any other specific test or alternative procedure that would not have presented an equal risk of a disparate statistical result. The petitioner's witness

testified only in general terms that other, unspecified tests could have been created, and that other, also unspecified tests might be available commercially. The employer's experts testified that the test here was developed because a prior multiple choice test showed a disparate impact; that the essay test had the characteristics of a multiple choice test by having separate internal items or "benchmarks"; and that they had rejected commercial tests. Thus, even if it is assumed that the Eighth Circuit decision, read "subtly" constitutes a conflict among the circuits, the petitioners have failed even to fit that language alluded to, that "an alternative selection procedure" which did not have the same adverse impact was available. Petitioners' expert did not make such a

showing, and the district court found that the employer's experts, who were test preparers, had "shown" other alternatives to be unsatisfactory (Finding, Pet. App. 31A).

It was the function of the district court to evaluate the testimony of the witness, including the experts, and to determine the facts. The district did so. As this court has recently held in Anderson v. Bessemer City, ___ U.S. ___, 84 L. Ed. 518 (1985), it is not the function of the appellate courts to intrude into the findings of the district court.

II. The Employer Considered Alternative Testing Procedures.

Petitioners also misconstrue the concept of the "alternative testing"

procedure. The EEOC guidelines do not require that an employer use any alternative that is arguably available, but that an employer consider alternatives. 29 C.F.R. § 1607.3 (1979). In instances such as here, where tests may not be reused for security reasons, or at a minimum would have to be substantially rewritten, the statistical impact of a particular test may not be determined until after the test has been administered. No employer can guarantee that a test will not demonstrate a statistically disparate impact. In fact the testimony indicated that in an imperfect society, a test that truly measures job skills such as skill in writing standard English, may frequently show a disparate impact. That result is not the fault of the test, but a

reflection of reality. The employer's obligation is to consider other alternatives in the test planning stage, and that was done here.

The content validation approach, which is permissible, often uses job simulations as a testing mechanism. In this instance the essay format functioned as a demonstration of the ability of a personnel specialist to actually prepare a job description, a primary element of the personnel work.

The cost of commercial examinations is one of the valid criteria an employer may consider Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971). Commercial examinations that are expensive and do not fit the employer's needs need not be used. A mere general assertion that there are commercial

examinations in the area is not a showing of an alternative that would fit the employer's needs.

The circuit court properly accepted the district court's findings of fact that the plaintiffs had not shown other tests would also serve the employer's interest, and properly accepted the finding that the employer had studied alternatives and rejected the alternatives for legitimate reasons.

An employer is not required to use only a test that does not show a disparate impact. The employer's interests are primarily in selection of persons most able to do the work, not in the least discriminatory work force. To effectuate this goal an employer may use a test that is reasonably aimed at achieving this goal without prejudice.

Where a test is a job simulation, as here, and where it is not likely to be used again, the employer can only consider other test approaches, not guarantee that a particular test will not show a disparate impact. Stated otherwise, an employer is not required to use a standardized test to determine present job skills, such as writing.

The statistical impact could only be determined only after the test was scored. If the test has been professionally developed in accordance with the EEOC guidelines for the development of content validated tests, as held here, and if the employer considered other alternatives in the development process, then the employer may hire on the basis of the test result even if the result showed a disparate

impact. Otherwise, an employer would be effectively forced to use standardized tests. The employer could not be assured in advance that a particular job simulation would not show a disparate impact at any particular instance. Indeed even standardized tests may, produce a disparate result at any particular testing.

The employer was aware of the disparate statistics prior to setting the cutoff point. The employer's purpose required the use of both parts of the test. The employer's options were to use the test as given, or to develop a new test and start over. As the court of appeals found, the cutoff point was set to bring into the interview process as large a percentage of minorities as

possible, while still serving the cut off function (Pet. App. 18A).

The "alternative" must also serve the employer's legitimate interests which include factors of selection, administration, and cost. In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), this Court noted that an employer need not adopt a hiring process that meets some court's standard of the "'best' hiring procedures."

In this case the test was properly developed, properly adminstered, and reflected the professional experience of the employer with a prior multiple choice test that had showed a disparate impact, for a similar position. Contrary to the petitioner's contention, there was a basis for the district court's finding, specifically sustained by the court of

appeals, that a previous test had shown a disparate impact (Pet. App. 20A; 30A).

The district court found that the test had been developed in accordance with the EEOC guidelines, and that there was no evidence to indicate that other tests within those guidelines would have eliminated the disparate impact and meet the legitimate employment objectives of the employer. Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

The district court found that the employer had studied other alternatives and had rejected those alternatives for legitimate reasons, and held that the employer did not forsee that the test used would have a disparate impact.

The affirmative showing by the employer that the test chosen was itself an "alternate," dispels any suggestion

that use of this form of test--was a mere pretext to discriminate.

There is no conflict among the circuits that a plaintiff has the burden of showing that other alternatives would meet the employer's legitimate objectives and not have a disparate impact.

III. The Allocation Serves The Purposes Of Title VII.

Petitioners assert that the burden of proof allocation, adopted by this court does not satisfy the interests of Title VII. The interests of Title VII include the employer's interests in reasonable selection processes to hire the most qualified employes available. Since the district court decision in Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), this court decided Albermarle Paper Company v. Moody, 422 U.S. 405 (1975), and the EEOC guidelines were

altered to remove the impossible burden alluded to by the district court in Crockett, Id. See Contreras v. City of Los Angeles, id.

The proof allocation serves the purposes of Title VII.

CONCLUSION

This petition does not present any substantial federal question. The allocation of the burdens of proof and burdens of going forward used by the district and circuit courts in the decisions below were in direct accord with the rulings of this court and federal circuit courts.

There is no conflict among the circuits about the amount of evidence necessary to establish a showing of a reasonably available selection mechanism, and the record and findings support the

district and circuit court rulings that this petitioner had failed to make such a showing.

Respectfully submitted,

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No. 85-919

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1985

RONALD A. GILLESPIE,

Petitioner,

v.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN AND THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN.

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Most of the arguments advanced by the state in its brief have been adequately addressed in the petition itself. However, the respondent advances four arguments which require

further clarification. We address these arguments in turn.

ARGUMENT

I. THE DEFENDANT FAILED TO REBUT THE PETITIONER'S ASSERTION THAT THERE IS A CONFLICT AMONG THE CIRCUITS.

The state attempted to show that Easley v. Anheuser- Busch, Inc., 758 F.2d 251 (8th Cir. 1985) is not inconsistent with the holding below. We relied, in part, on Easley to demonstrate that the burden is more properly placed on the employer in a Title VII case to show that alternative selection procedures advanced by the plaintiff are unsatisfactory.

There are two reasons why this argument should not preclude consideration by certiorari. First, a fair reading of Easley, and the case law

on which it relied, shows that the Court of Appeals for the Eighth Circuit did effectuate the shift in the burden of proof which we advanced. Thus, Easley is contrary to the decision below and also at odds with Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

Second, even if the state had shown that Easley was not inconsistent, it nevertheless failed to address the other case law that we cited in support of the same proposition. E.E.O.C. v. St. Louis-San Francisco Railway Company, 743 F.2d 739, 742 (10th Cir. 1984); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981); Horace v. City of Pontiac, 624 F.2d 765, 769 (6th Cir. 1980) each demonstrate that a plaintiff in a Title

VII case should not be required, in order to meet the third prong of the disparate impact test, to develop an alternative selection device, validate it, and prove that it would not have had a significant disparate impact on minorities.

The state has therefore not rebutted our assertion that there is a conflict among the circuit courts on the amount of evidence necessary for a plaintiff to establish a reasonably available alternative selection mechanism.

II. THE PLAINTIFF'S EVIDENCE ESTABLISHED THE EXISTENCE OF REASONABLE, LESS DISCRIMINATORY ALTERNATIVE TESTS.

The main thrust of the state's argument is that plaintiff did not identify an alternative selection device

that would not have presented an equal risk of disparate impact. If the state argues that the plaintiff did not independently develop an alternative examination, validate it, and then administer it to a body of qualified applicants to determine if it had an equally undesirable disparate impact, it is correct. However, whether that level of proof is required is precisely the question which the petition seeks to place before the Court.

The plaintiff did introduce unrebutted evidence that other types of examinations were available and would have generally created less disparate impact than the type of examination in question. We showed, in fact, that some were actually favored by the state's own

published policies on selection procedures.

Where several examinations have a disparate impact, the one with the lesser impact should be selected. See Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980); Contreras v. City of Los Angeles, supra.

This showing by the plaintiff should have required the defendant to come forward with evidence that those selection devices did not meet its objective of obtaining qualified applicants. The courts below, therefore, erred in concluding that plaintiff had not met his burden under the third prong of the test.

III. WHETHER THE DEFENDANT CONSIDERED OTHER TESTING ALTERNATIVES IS IRRELEVANT.

The state argued that it met its obligation with respect to the reasonable alternative standard because it considered, in the abstract, using other types of selection devices. Although the EEOC Guidelines require the consideration of alternatives, 29 C.F.R. §1607.3, those Guidelines do not provide that the mere consideration of alternatives will shield an employer from liability under Title VII where the alternative selected is actually discriminatory.

Thus, while the state met its procedural obligation to consider more than one test, the question presented is whether the test finally chosen was discriminatory under Title VII.

IV. TITLE VII IS DIRECTED AT THE ERADICATION OF DISCRIMINATION.

In response to our contention that the standards applied below do not further the objectives of Title VII, the state asserts that the "interests" of Title VII are primarily concerned with the employer's interests in hiring the most qualified employees available. While the hiring of qualified applicants is certainly a consideration, that interest must be considered as part of the overall goal of Title VII to eliminate discrimination in the work place.

The real goal of Title VII is to enable employers to secure qualified applicants in a manner which does not discriminate.

As the Ninth Circuit Court of Appeals has stated, Title VII is directed at the eradication of discrimination by employers. Silver v. KCA, Inc., 586 F.2d 138 (9th Cir. 1978); see also Bradington v. International Business Machines Corp., 360 F.Supp 845 (D.C. Md. 1973), affirmed 492 F.2d 1240 (4th Cir.).

The burden of proof adopted by the courts below allows the employer to secure qualified applicants. However, because it imposes requirements that are impossible for a Title VII plaintiff to meet, it fails to require that an employer secure the applicants in a manner that imposes the least disparate impact on minority candidates. It effectively eliminates the third prong of the disparate impact test.

Given the competing interests inherent in Title VII, this Court should consider whether this method of allocating the burden of proof is consistent with the broad, and sometimes conflicting, objectives of Title VII.

CONCLUSION

This Court should grant the petition for certiorari and review the decision below on the important questions presented.

Dated this 15th day of January, 1986.

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